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No. 497

In the Supreme Court of the United States

OCTOBER TERM, 1946

149 MADISON AVENUE CORPORATION, ET AL.,
PETITIONERS

v.

FRANK ASSELTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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730260—47——1

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In this case, as in *Walling* v. *Halliburton Oil Well Cementing Co.*, pending before this Court as No. 74, and *Walling* v. *The General Industries Co.*, pending before this Court as No. 564, the question is whether the method of compensation employed achieves compliance with the overtime requirements of Section 7 of the Fair Labor Standards Act. In the *Halliburton* case the employment contract specified hourly rates of pay and also contained a minimum weekly guaranty which was to be paid whenever the hours worked

per week did not exceed 84. In the *General Industries* case, the employees were paid a monthly salary for a regularly scheduled work-week, but the contract did not specify any hourly rates nor provide a method for computing them. In the instant case the agreement provided a weekly wage for a fixed number of hours of work and, without specifying hourly rates for those employed more than 40 hours per week, contained a formula by which they were to be determined. In each of the three cases the Administrator is of the opinion that the agreed weekly o monthly wage actually determines the compensation which the employees receive and, therefore, that the statutory regular rate should be calculated by dividing the weekly wage (or the monthly wage reduced to its weekly equivalent) by the number of hours for which it was paid in accordance with the rule announced in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, and followed in *Floyd* v. *Du Bois Soap Co.,* 317 U. S. 596, and *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. However, the combination of factors which demonstrate the controlling character of the weekly wage and the artificiality of the "regular" hourly rates urged by the employers is different in each case.

STATEMENT

This is an action under Section 16 (b) of the Act brought by maintenance employees in peti-

tioners' loft building to recover unpaid overtime compensation (R. 1–18).[1] Until April 20, 1942, respondents were employed under the so-called "Sloan Agreement" which provided for the payment of a minimum weekly wage of $25 for a scheduled workweek in excess of the statutory maximum and for the payment of overtime compensation at time and one-half for hours worked in excess of the scheduled workweek (Ex. 3, pp. 11–14, 2).[2] The Sloan Agreement expired on April 20, 1942, but a new agreement was not executed until September 1, 1942. The status quo was maintained pending negotiations, however, and the new agreement provided that its wage provisions would "take effect retroactively" to April 21 (Ex. 1, p. 12; Ex. 4, p. 6).

The new agreement[3] provided a regular workweek of 54 hours for watchmen, a regular work-

[1] Although the parties herein have employed in their briefs the symbol "R." to refer to folio numbers and the symbol "R. p." to refer to page numbers, this brief will adhere to the usual practice of using the symbol "R." for page references in the record. References to plaintiffs' exhibits in the Exhibit Volume are indicated by "Ex."

[2] Petitioners have paid the overtime compensation and have agreed to pay the liquidated damages for the period prior to April 20, 1942 (R. 72–73). This period is no longer involved in this action.

[3] Although captioned "National War Labor Board Agreement," it appears from the Directive Order of that Board that the Board expressly declined to write a contract for the parties although it understood that they desired to adopt the formula as to hours and wages incorporated in the agreement of September 1 (Ex. 4, pp. 3, 45, 47, 55–56).

week of 46 hours for other employees, and a minimum weekly wage of $27.50 (Ex. 1, pp. 25–28).[4] Most of the employees were paid the minimum weekly wage and received a wage increase of $1.40 per week in October 1943 (Ex. 6, pp. 36–103).[5] The agreement also contained a formula which provided that "the hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours" (Ex. 1, p. 27). An overtime rate of "at least time and one-half" the formula hourly rate was provided for the hours worked between 40 and 54 by watchmen and between 40 and 46 by other employees (Ex. 1, p. 29). An overtime rate of "double time" for hours in excess of 54 per week was provided for watchmen and of "time and three-quarters" for hours in excess of 46 per week for other employees (*Ibid.*). The rates for overtime after the scheduled work-week were intended to approximate time and one-half the average rate for the scheduled work-week (Ex. 4, p. 70).

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[4] The agreement set up different wage and hour schedules for apartment, office and loft buildings. It also set up different wage and hour schedules within those classifications for buildings of different size. Throughout this brief we refer only to the provisions which are applicable to petitioners' loft building.

[5] This increase was made retroactive to April 21, 1943 (Ex. 6, p. 97).

Although the new agreement provided that it would take effect September 1, 1942, and that the wage provisions would take effect retroactively to April 21, 1942, hourly rates for straight-time and overtime do not appear on the payroll records until September 20, 1942 (Ex. 6, pp. 36–103).[6] The hourly rates then shown were determined by dividing the weekly wage by the number of hours in the scheduled workweek plus one-half the number of hours in the scheduled workweek in excess of 40.[7] Frequently application of these rates did not result in the exact equivalent of the weekly wage (see *infra*, pp. 23–24). When this occurred the weekly wage was nevertheless paid. (R. 83, Ex. 6, pp. 36–103.)

The agreement contained several provisions under which employees would receive more than the formula straight-time rates for non-overtime hours. Per diem rates of pay were stated to be a proportionate amount of the weekly wage (Ex. 1, p. 32). Specific hourly rates for employees who regularly worked less than 40 hours were provided

[6] The weekly wage increase of $2.50 provided in the new agreement was paid retroactively to April 21, 1942, when the new agreement became effective (Ex. 6, p. 35). No other adjustments in compensation for the retroactive period were made.

[7] This method of computing hourly rates does not appear to conform to the contract formula which provides that the number of hours *actually* employed each week, rather than the *scheduled* number of hours, shall be used in determining the hourly rates (Ex. 1, p. 27).

which equalled the average hourly rate for regularly scheduled workweeks, not the lower rate computed according to the contract formula (Ex. 1, p. 28). Deductions for "excusable" absences were to be made at not more than formula straight-time rates, even though the absences were for overtime hours (Ex. 1, p. 29). This resulted in the payment of formula overtime rates for non-overtime hours and assured the payment of more than the average hourly rate paid in regularly scheduled workweeks.

The district court found as a fact that respondents "were employed by the defendants at fixed weekly rates of compensation" and that "the agreement formula for determining the hourly rates * * * did not correctly calculate or determine the true hourly rates of * * * employment" (R. 57). It therefore held that the regular rate should be determined in accordance with the rule laid down in *Overnight Motor Co.* v. *Missel, supra* (R. 66–67). The court of appeals held that "The effect of the use of the formula was to make any increase in the employees' pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon" (R. 83). It further held that it negates "the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek

in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay" and the attempt to make the contract retroactive "but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute." (R. 84.)

SUMMARY OF ARGUMENT

The validity of the compensation plan in the instant case depends upon the genuineness of the hourly rates employed by petitioners. *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419. As we have seen, these hourly rates were not specified in the agreement, but a formula for their computation from the weekly wage was prescribed. Thus petitioners did not compute the hourly rate in the ordinary manner by dividing the weekly wage by the number of hours for which it was paid, 54 in the case of watchmen and 46 in the case of others (see *Overnight Motor Co.* v. *Missel, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra; Floyd* v. *Du Bois Soap Co., supra*), but by dividing by 61 in the case of watchmen

and 49 in the case of others. The failure to agree upon specific hourly rates and the artificial manner of their computation strongly indicate that the formula hourly rates were fictitious.[8] Cf. *Walling* v. *Helmerich & Payne, supra.* Of perhaps greater significance in demonstrating the artificiality of the formula rates, however, are the other provisions of the contract and the practices under it which refute petitioners' contention that the formula rates were actually applied and establish that the employees were in fact paid not the formula rates but the average hourly rate for the scheduled workweek. The features of the plan which negate the genuineness of the formula rates are as follows: (1) the hourly rate established for employees employed less than 40 hours a week was not the formula rate but the equivalent of the weekly wage divided by the number of hours in the scheduled workweek (54 in the case of watchmen, 46 in the case of others); (2) daily rates of pay were arrived at not by application of the formula rates but by dividing the applicable weekly wage by the normal number of days in the workweek; (3) employees employed for regular workweeks of 54 or 46 hours who

[8] As the district court stated: "The situation in *Walling* v. *Belo Corp.*, 316 U. S. 624, is clearly distinguishable since there the contracts provided for an hourly rate and not, as here, for a weekly rate to be reduced to an hourly rate by dividing it by hours in excess of those actually worked during the week." (R. 67.)

actually worked less than 40 hours because of "excusable" absences were paid at formula overtime rates for some of their non-overtime hours with the result that their actual rate of compensation approximated 1/54 or 1/46 of the weekly wage rather than the formula hourly rate; (4) the overtime rates of double time after 54 hours for watchmen and time and three-quarters after 46 for others were established to approximate one and one-half times the average hourly rate for the scheduled workweeks of 54 and 46 hours; (5) in regularly scheduled workweeks the weekly wage was paid even when application of the formula rates did not result in the exact equivalent of the weekly wage.

The above factors furnish convincing evidence that the weekly wage for a fixed workweek was the real measure of the employees' compensation, that the intention of the parties was to establish an actual rate of employment equivalent to the weekly wage divided by 54 or 46, the number of hours in the scheduled workweek, and that the formula for computing the hourly rates was merely a "mathematical manipulation" devised to enable petitioners to create "an illusion of overtime pay after a forty hour workweek" (opinion below, R. 84) and thus to avoid paying real overtime wages "unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed work-

week" (opinion below, R. 84). Cf. *Walling* v. *Helmerich & Payne, supra,* at 40. In these circumstances the formula hourly rates are obviously unrealistic and the regular rates for statutory purposes should be computed by dividing the weekly wage by the number of hours in the scheduled workweek for which it was paid in accordance with the rule of the *Missel* case. This would give effect to the genuine regular rate contemplated by the agreement and require the payment of true overtime after 40 hours rather than after 54 or 46.

ARGUMENT

I

THE CONTRACT FORMULA PROVIDES AN ARTIFICIAL METHOD FOR COMPUTING HOURLY RATES

If the intention of the parties had been to agree upon hourly rates instead of a weekly wage it would have been a simple matter to express such an agreement in the contract. But, as the court below found "the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in terms of dollars or cents but * * * attempted to bring the agreement within the statute by means of the formula above quoted." (R. 82.) The contract provided for a weekly wage for a scheduled workweek and further provided that hourly rates of pay for employees regularly employed more

than 40 hours a week were to be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of 40.[9] Had the agreement contained only the weekly wage provisions, petitioners' compensation practices would have been in clear violation of the overtime requirements of the Act. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Floyd* v. *Du Bois Soap Co.,* 317 U. S. 596; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. The first question, therefore, is whether the incorporation in the contract of the above "X-formula" for calculating hourly rates takes the instant case outside the scope of the *Missel* rule. It is the view of the Administrator that it does not.

The significance of the failure to specify hourly rates of employment where a weekly wage is agreed upon, even though there is an intention to have the weekly wage include overtime, is discussed in the Government's brief in *Walling* v. *The General Industries Co.,* No. 564, this Term, and will not be repeated here. We urge there that the failure of specification requires the conclusion that the actual basis of compensation is the

[9] This formula for computing the hourly rate of pay has generally become known as the "X-formula" in which "X" represents the variable hourly rate computed after the completion of each workweek. The weekly compensation for regular and overtime hours based on this rate will always be the exact equivalent of the predetermined weekly salary.

weekly wage and, therefore, that the regular rate is ascertained by application of the *Missel* formula. Although the X-formula in the contract here provides a means for determining hourly rates, we believe that rates determined in this manner are not genuine rates, particularly where the divisor of the weekly wage is stated to depend upon the hours actually worked, and that the weekly wage remains the only real basis of compensation. The rates derived from use of the formula have no independent significance in determining the employees' compensation because they fluctuate from week to week and are not known until the number of hours actually worked are known (opinion of district court, R. 66; *Castle* v. *Walling*, 153 F. 2d 923, 924 (C. C. A. 3)). The formula "serves only as a means of arriving at a figure for the regular rate which, together with the overtime rate, represents the weekly wage." *Walling* v. *Helmerich & Payne*, 138 F. 2d 705, 707 (C. C. A. 10). Since the X-formula rates are not in fact the rates at which employees are paid, they are not the regular rates to be used for computing statutory overtime. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.[10]

[10] The Circuit Court of Appeals for the Tenth Circuit in the *Helmerich* case held an X-formula invalid (138 F. 2d at 707) although it upheld the validity of the split-day plan subsequently held invalid by this Court.

The X-formula also frustrates the statutory policy of requiring the payment of additional compensation for hours worked in excess of the statutory workweek. It calculates "regular" and "overtime" hourly rates "so as to insure that the total wages for each tour [workweek here] would continue the same as under the original contracts, thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory minimum workweek of 40 hours became effective." *Walling* v. *Helmerich & Payne*, 323 U. S. at 38–39. Like the hourly rates calculated in the *Helmerich* case, the rates are "derived not from the actual hours and wages but from ingenious mathematical manipulations" (p. 41) for the purpose of perpetuating the prior compensation practices. While the question of the validity of the X-formula, as such, has not previously been presented to this Court, the rationale of the decisions of this Court so clearly demonstrates its artificiality that the lower courts have unhesitatingly and consistently rejected it. *Walling* v. *Helmerich & Payne*, 138 F. 2d 705 (C. C. A. 10); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied, 327 U. S. 777; *Castle* v. *Walling*, 153 F. 2d 923 (C. C. A. 5); see also *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. 2d 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10).

Under an X-formula plan the actual basis of compensation is obviously the weekly wage.

Therefore, as the district court held, since the parties "fixed a weekly wage by agreement, the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.' *Walling* v. *Hardwood Co.*, 325 U. S. 419, 425." (R. 66.) Just as the computation of the genuine regular rate in the *Helmerich* case "required only the simple process of dividing the wages received for each tour by the number of hours in that tour" (p. 40), so here, computation of the genuine regular rate requires only the simple process of dividing the salary received for the workweek by the number of hours for which it was paid in accordance with the rule of the *Missel* case, *supra*.

Although petitioners urge that the "contract hourly rates" fixed by the agreement were bona fide regular rates, they apparently did not compute the rates they used in accordance with the terms of the formula as it appears in the contract. Instead of dividing the weekly wage by the number of hours employed plus one-half the number of hours *actually* employed in excess of 40 hours, petitioners divided by the *scheduled* number of hours plus one-half the *scheduled* hours in excess of 40, namely, by 61 in the case of watchmen and 49 in the case of other employees (Petitioner's br. pp. 11–12). Without considering the effect of employing hourly rates calculated in a

manner not provided in the contract, it may be conceded that computation of the hourly rates in this method somewhat lessens their artificiality since they are known in advance once they have been computed. But this does not mean that they are bona fide rates of employment. The use of 61 or 49 as the divisor of the agreed weekly wage rather than the actual number of hours for which it was paid at once suggests a fictitious mode of calculation. Moreover, the statutory purposes are defeated even under the formula as applied by petitioners. As stated by the court below, "The effect of the use of the formula was to make any increase in the employees' pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon. * * * The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek." (R. 83.) Thus the formula even as applied by petitioners contains elements of artificiality. The invalidity of petitioners' method of compensation, however, is evidenced not only by the application of the formula but by other features of the plan which will be discussed in Point II.

II

OTHER FEATURES OF THE PLAN DEMONSTRATE THE ARTIFICIALITY OF THE FORMULA RATES AND THEIR PURPOSE TO AVOID THE PAYMENT OF OVERTIME COMPENSATION AS REQUIRED BY THE ACT

Provisions of the contract and petitioners' practices under it, in addition to the formula itself, demonstrate that the formula rates were artificially devised to avoid the payment of overtime compensation "unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek" (opinion below, R. 84). The fictitious character of the formula rates is illustrated by the fact that they were virtually never used and that other rates which directly reflected the weekly wage rate were in fact employed. In workweeks of scheduled hours the weekly wage was always paid even though the application of the formula rates frequently equalled a slightly different amount. In workweeks of less than the scheduled hours, the contract provisions ordinarily assured the payment of at least a pro rata share of the weekly wage although application of the formula rates would have equalled a lesser amount. In workweeks of more than scheduled hours, compensation for hours in excess of those scheduled was approximately the equivalent of one and one-half times the average weekly rate, the same as it had been before the present agreement became effective. In other words, petitioners attempted to substi-

tute the scheduled workweek of 54 or 46 hours for the 40-hour statutory workweek and, by the "mathematical manipulation" of the formula, sought to avoid the payment of real overtime until hours in excess of the scheduled week were worked while creating "an illusion of overtime pay after a forty hour workweek" (opinion below, R. 84). See *Walling* v. *Helmerich & Payne*, 323 U. S. at 41.

Petitioners' contention that the decision below "invalidates any wage plan fixing or guaranteeing compensation on a weekly or monthly basis for a regularly scheduled workweek exceeding forty hours"[11] (Brief, p. 24), plainly misconceives its effect. Such a plan may be valid where the hourly rates provided in the contract are in fact the rates which determine the employees' compensation. This Court has stated that the wage agreements in *Walling* v. *Belo Corp.*, 316 U. S. 624, "were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 426. Petitioners' difficulty is that the contract provisions and the practices under it conclusively indicate that the compensation scheme

[11] The question of the validity of a weekly or monthly guarantee for "an irregular workweek habitually exceeding forty hours per week" (Brief, p. 24) is now before the Court in *Walling* v. *Halliburton Oil Well Cementing Co.*, No. 74, and is not involved here.

was an evasive device and that the hourly rates shown on the books were not in fact the rates at which the workers were actually employed.

Perhaps the most striking illustration of the fact that the formula rates were artificial labels designed to preserve the 46- and 54-hour weeks without payment of statutory overtime is to be found in the specific hourly rates assigned in the contract to employees employed less than 40 hours per week. These rates were not the formula rates but were equal to 1/54 of the weekly wage for watchmen and 1/46 of the weekly wage for other employees. The agreement provided that employees other than watchmen would be paid a weekly minimum wage of $27.50 for 46 hours (Ex. 1, pp. 25, 27). The agreement also provided for a minimum hourly rate of 60 cents if the regular workweek was less than 40 hours (Ex. 1, p. 28). Dividing the weekly wage by 46, however, reveals that the average hourly rate for the 46-hour week was also 60 cents. Similarly, in the case of watchmen the agreement provided a minimum weekly wage of $27.50 for a regular 54-hour week and an hourly rate of 51 cents for a workweek of less than 40 hours (Ex. 1, pp. 25, 28). Dividing the weekly wage by 54 reveals that the average hourly rate for the 54-hour week was also 51 cents. The operation of these provisions is illustrated by the payments made to the two watchmen, McCole and Bilbow. Prior to the

agreement, McCole (who worked a five-day week) and Bilbow (who worked the other two days) received the same rate of pay (Ex. 6, pp. 13–32). After the agreement became effective, Bilbow was assigned an hourly rate of 51 cents as specified in the contract and McCole 45 cents as computed by the formula. That McCole was assigned a lower rate than his relief employee is explained by the fact that the hourly rate assigned McCole was not the genuine rate. Despite the different contract rates both continued to be paid at the same actual rate. McCole's salary, divided by his regularly scheduled hours, results in the same hourly rate of 51 cents as that paid Bilbow. Thus the obvious intent of the parties was to pay all watchmen 51 cents an hour for the first 54 hours of work and to pay all other employees 60 cents an hour for the first 46 hours of work. The formula rates were devised to permit this to be accomplished despite the overtime requirements of the Act.

Disregard of the formula rates and further evidence of the intention to pay at the average weekly wage rate for all hours under the scheduled workweek may also be found in the contract provision that "Per diem rates of pay of any employee shall be arrived at by dividing the applicable weekly wage by the normal number of days per week worked by that employee" (Ex. 1, p. 32). It is apparent that this

provision for daily rates of pay is inconsistent with the formula rates unless the daily wage is interpreted to include both straight-time and overtime pay. But even this interpretation of the daily wage would be deemed artificial under this Court's decision in *Walling* v. *Helmerich & Payne, supra.*

The contract provision relating to deductions for absences was but another means of avoiding the application of the formula rate and of paying not less than the average weekly rate regardless of the number of hours worked. The only clause in the contract relating to absences provides that deductions for "excusable" absences are to be made at not more than straight-time rates (Ex. 1, p. 29). In accordance with this provision, in workweeks of 40 hours or less it was petitioners' practice to pay for six hours of work at formula overtime rates although no overtime was worked. Thus if an employee worked 30 hours in a week, he was paid for 24 hours at straight-time rates and for 6 hours at overtime rates. The effect of this practice was to avoid payment at the low formula rates while attempting to maintain the fiction that they were actually in use.[12] The device of paying so-called overtime compensation for non-overtime hours in order to pay more than the stated hourly rate but to avoid the payment of overtime on

[12] The following tabulation of the payments made in four

the higher rate was condemned by this Court in *Walling* v. *Helmerich & Payne, supra.*[13]

workweeks involving excusable absences illustrates this point (Ex. 6, pp. 44, 48, 58, 102):

Employee	Weekly wage	Hours in scheduled workweek	Hours actually worked	Formula rate	Average rates for scheduled workweek	Average rate for hours actually worked
Anderson	$27.50	46	39	$0.561	$0.598	$0.604
Torra	30.50	46	32	.622	.663	.681
Peterson	27.50	46	30	.561	.598	.617
Santiago	28.90	46	40	.589	628	.634

It is at once apparent from the above tabulation that the effect of the method of making deductions at straight-time rates for excusable absences was to insure employees that they would receive considerably more than the formula rate and not less than a proportionate amount of the weekly wage rate.

[13] The intention to avoid a reduction in the average rate of pay is also apparent from the following provision contained in the section of the contract dealing with "Hours and Hourly Rates" (Ex. 1, p. 27): "No one regularly employed more than forty (40) hours per week shall have his regular working hours reduced by the employer in order to effect a corresponding reduction in pay." This provision also offends the statutory policy of reducing the hours of work to 40 by making those in excess of 40 more costly.

In some workweeks the assigned non-overtime, rather than the overtime, rates were paid presumably because the absences were considered not excusable. Since the contract is silent on how deductions are to be made for inexcusable absences, it cannot be ascertained whether deductions at the higher rate were intended as a penalty. In any event, the payment of the assigned non-overtime rates in a few instances does not, of course, render the plan less artificial in workweeks when different rates were paid or impugn the finding of the courts below that the formula rates were ineffective and that the true "regular rate" is that determined by dividing the weekly salary by the regularly scheduled hours.

The overtime rates paid by petitioners for hours in excess of 46 or 54 are equally revealing of the artificial character of the formula and of petitioners' purpose to pay real overtime compensation only for hours in excess of the scheduled workweek. Provision for a different overtime rate after the scheduled workweek from that employed after the statutory workweek itself suggests an artificially contrived arrangement. The explanation lies in the fact that the "overtime" rates for hours in excess of 46 and 54 were designed to approximate time and one-half the rate reached by dividing the salary by 46 or 54. This conformed with petitioners' prior agreement which required the payment of overtime after the scheduled workweek at time and one-half the regular rate (Ex. 3, pp. 11–14). As stated by the National War Labor Board, the provision for overtime at "time and three-quarters" after 46 hours was expressly made "in an effort approximately to equal the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half after a forty-six (46) hour week" (Ex. 4, p. 70). The court below also recognized the intention to base genuine overtime upon the scheduled rather than the statutory workweek in its statement that the effect of the agreement was to make "[illegible]y increase in the employees pay above the weekly

rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon" (R. 83).

That the rates assigned on the pay rolls were fictitious is further demonstrated by an analysis of the pay rolls in the regularly scheduled workweeks, which constitute the normal pattern from which the "short" and "long" workweeks discussed above are exceptions.[14] The formula rates were constantly manipulated in an attempt to have them produce the agreed weekly wage. The manipulations occurred in a variety of ways: the overtime rate on the books was sometimes less than time and one-half the straight-time rate[15] and sometimes more;[16] the product of the straight-time rate and the straight-time hours was incorrectly entered;[17] the product of the overtime rate

[14] Over 70 percent of the workweeks of all the employees shown on petitioners' payrolls for this period were of the regularly scheduled length.

[15] For example, McCole was assigned a "regular" rate of $.48 and an "overtime" rate of only $.69; Torra was assigned a "regular" rate of $.65¼ and an overtime rate of $.96½ (Ex. 6, pp. 94–96, 98–103).

[16] For example, Anderson, Peterson, Del Rio and Manne were assigned a "regular" rate of $.561 and an "overtime" rate of $.843; Berger was assigned a "regular" rate of $.86½ and an "overtime" rate of $1.30 (Ex. 6, pp. 36–62).

[17] For example, the payrolls for Anderson, Del Rio and Manne show a "regular" rate of $.589 for 40 hours as equalling $23.59; the correct total is $23.56 (Ex. 6, pp. 94–96, 98–103).

and the overtime hours was incorrectly entered;[18] and the sum of straight-time compensation and overtime compensation was incorrectly stated.[19] In all instances the manipulations resulted in obtaining the predetermined weekly wage and in all regularly scheduled workweeks the agreed weekly wage was paid. As the court below stated, the use of the formula "involved mathematical computations which in most instances would, if the formula was strictly adhered to, not result in the exact weekly pay agreed upon. The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula." (R. 83.) The discrepancies, although slight, reveal the clear intent to pay the salary and not the formula rates.

The true nature of petitioners' method of compensation is further apparent from a weekly sal-

[18] In the examples listed in the preceding footnote, the payrolls show an overtime rate of $.844 for 6 hours as equalling $5.31 instead of $5.30, the correct total. The sum of the "errors" ($23.59 plus $5.31) is $28.90, the agreed salary, instead of $28.86, the mathematically correct computation based on the assigned rates. On the same payrolls, McCole's "overtime" pay at $.69 for 14 hours was shown as $9.70, the correct total would be $9.66. Also on the same payrolls, Torra's "overtime" rate of $.965 for 6 hours is shown as totalling $5.80, instead of the correct figure, $5.79.

[19] For two weeks McCole's "regular" rate was shown as $.45, or $18.00 for 40 hours and $.676 for overtime or $9.46 for 14 hours. These figures were entered on the records and were added to total $27.50 (the then minimum) rather than $27.46. (Ex. 6, pp. 37, 38.)

ary increase of $1.40 granted on or about October 10, 1943, and made retroactive to April 21, 1943 (Ex. 6, pp. 94, 97). The pay roll record showing the retroactive increase reveals that it was on a weekly rather than an hourly basis and was paid irrespective of whether overtime was worked; thus, an employee who had worked 15⅓ weeks received 15⅓ times $1.40 (Ex. 6, p. 97). The same practice was followed when the $2.50 weekly increase provided in the agreement of September 1, 1942, was applied retroactively to April 1942.[20] Since the salary increase must be considered as part of the salary in applying the formula, it must be deemed to include both straight-time pay and overtime pay. The payment of a pro rata share of the increase for a fraction of a week again demonstrates that "overtime" pay was paid for non-overtime hours in order to maintain the same average hourly rate for all hours in the scheduled workweek.

Finally, the artificiality of the agreement of September 1, 1942, is clearly illustrated by the assumption that it could be made retroactive to April 20 by a mere statement to that effect without any pay adjustments based on the hourly rates of the new agreement. As we have seen,

[20] Thus one employee who had worked 1⅔ weeks during that period received 1⅔ times $2.50 and others received 19⅔ or 20⅚ times $2.50, a clear indication that the increase was viewed as a "straight-time" increase for each day of the week and included no extra compensation for overtime. (Ex. 6, p. 35.)

between April and September 1942 employees were paid under the terms of the Sloan Agreement with the understanding that the new agreement would be retroactively applied. The Sloan Agreement "merely fixed non-overtime wages for a fixed workweek of 47 hours [21] without any provision for overtime within the 47-hour workweek" (Petitioner's br., p. 11). Deductions were made for absences at the average hourly rate [22] and additional payment for hours in excess of 47 were supposed to be made at time and one-half this rate.[23] It is apparent that the hourly rates and the provisions for overtime under the two agreements are entirely dissimilar. Nevertheless, the only adjustment in compensation made pursuant to the provision requiring the retroactive application of the new agreement was the payment of the $2.50 weekly wage increase. The rate of pay which had been shown on petitioners' records as

[21] For the last four weeks of the period, beginning August 10, the hours were reduced to 46. The salary was not changed.

[22] The payroll for May 18–23, 1942 (Ex. 6, p. 17), indicates that employees who worked 39 and 42 hours were paid at $.53⅓ per hour, and that the wage for the scheduled week was $25.00 for 47 hours or $.53$^{9}/_{47}$ per hour. See also the payrolls for June 28–July 11, 1942 (Ex. 6, pp. 23, 24) where employees who worked only 4 out of 6 days were paid only ⅔ of their weekly wage.

[23] Actually in some weeks hours in excess of those scheduled were paid for at straight-time rates (payrolls for Torra and Del Rio, Ex. 6, p. 17) and in other weeks "overtime" was less than time and one-half the average rate (payrolls for Del Rio and Manne, Ex. 6, p. 23). In still other weeks time and one-half the average rate was paid (Ex. 6, pp. 24, 31).

the weekly wage remained unchanged; hourly rates were not recorded (Ex. 6, pp. 13–32). Thus petitioners apparently are of the view that, as long as the agreed salary is paid, the formula automatically makes all adjustments necessary to comply with the Act, for changes in the regular workweek, as well as for changes in salary.[24] As the court below observed, the argument that compliance was achieved by a mere statement that the agreement was retroactive "but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute" (R. 84).

CONCLUSION

The holding of the courts below that the actual "regular rate" is the rate determined by dividing the salary by the regular number of hours for which it was paid, and is not the artificial, formula-derived rate shown on the pay rolls, is fully supported by the evidence. It therefore follows that the courts below correctly applied

[24] Petitioners' statement that "more was paid the employees than required by the agreement" (Brief, p. 10) is misleading. Even under petitioners' theory that the weekly wage included overtime, the argument is not made that it included overtime for hours in excess of the scheduled workweek. We have seen that some employees worked such overtime during the retroactive period and were paid additional compensation at varying rates ranging from straight-time to time and one-half. There is no explanation for the failure to pay compensation in addition to the $2.50 to employees who worked more than the scheduled hours (see n. 23, *supra*).

this Court's decisions in the *Helmerich, Harnischfeger* and *Youngerman-Reynolds* cases, *supra,* in holding that compliance with the Act was not achieved by payment of overtime based on the formula rates assigned on the pay rolls. The judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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